

82 - 1895

Case No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

THOMAS H. KREBS,
Petitioner,

vs.

MARY RITA KREBS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENTH DISTRICT, COURT OF APPEALS
FRANKLIN COUNTY, OHIO

PETITION FOR WRIT OF CERTIORARI

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FILED
MAY 23 1983
ALEXANDER L. STEVAS,
CLERK

QUESTIONS PRESENTED

1. Whether the Ohio guardianship statutes are unconstitutionally overbroad and vague when applied to circumvent an individual's constitutional rights of privacy and to refuse medication?

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OPINION BELOW

The opinion of the Court of Appeals, Tenth Appellate District of Franklin County, Ohio, appears in the Appendix hereto.

JURISDICTION

The Supreme Court of Ohio refused to grant certiorari to hear this case on February 23, 1983. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1257.

STATUTORY PROVISION

United States Constitution Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in

Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Petitioner, Thomas Krebs, was involuntarily committed to the Central Ohio Psychiatric Hospital (hereinafter "COPH") on May 28, 1982, under the Ohio civil commitment statutes. Civil commitments are initiated by a sworn affidavit and in this case, the Petitioner's mother filed the affidavit. The evidence addressed at the commitment hearing did not show Petitioner to represent a substantial risk of danger to himself or others.

During Petitioner's hospitalization, Petitioner consistently refused all medication which was not forced upon him by the medical staff since the hospital's policy did not allow for the forced medication of a patient when not a substantial risk of harm to himself or others. The staff of the hospital approached Petitioner's mother in order to have Petitioner adjudicated incompetent under Ohio Guardianship Law so that the guardian could consent to the medication for Petitioner.

On June 29, 1982, the guardianship application was filed in the Franklin County Probate Court, Columbus, Ohio and was eventually granted on August 11, 1982.

Subsequent to the granting of the guardianship, Petitioner received numerous injections of psychotropic medications as recommended by his treatment team which were administered against his wishes.

On August 13, 1982, Petitioner appealed the commitment proceedings and moved for a stay to prevent the guardian from consenting to medication on behalf of Petitioner. The Ohio Court of Appeals, Tenth Appellate District denied the appeal and rendered its decision on October 28, 1982.

A Notice of Appeal was then filed in the Ohio Supreme Court on December 29, 1982, along with Memorandum in Support of Jurisdiction raising substantial constitutional

questions. The Ohio Supreme Court, on February 23, 1983, denied certification.

Petitioner is now appealing to this Court from the Ohio Supreme Court's refusal to hear the matter which Petitioner feels involves substantial constitutional questions of great general interest.

REASONS FOR GRANTING THE WRIT

I. THE APPLICATION OF THE OHIO GUARDIANSHIP STATUTES CIRCUMVENT PETITIONER'S CONSTITUTIONAL RIGHT OF PRIVACY AND THE RIGHT TO REFUSE MEDICATION.

The application of the Ohio Guardianship Statutes to cause Petitioner to be medicated against his will was a violation of his due process rights.

Due process analysis is a two step approach. *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481-483 (1972). The initial inquiry is whether the private interest affected is a "liberty" or "property" interest within the meaning of the due process clause. Cf., e.g., *Perry v. Sinderman*, 409 U.S. 593 (1972). If the deprivation is found to be of a constitutional stature the inquiry continues to the second step of the due process analysis, balancing, with respect to each procedural protection, the magnitude of the individual interests, and the importance of the procedure in protecting them against countervailing state objectives. *Bell v. Burson*, 402 U.S. 535 539-542 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970).

The loss of liberty and the infringement of other fundamental rights resulting from involuntary civil commitments and a subsequent finding of incompetence are certainly cognizable under the due process clause. Indeed, this Court has recognized the massive curtailment of rights synonymous with involuntary civil commitment. *Humphrey v. Cody*, 405 U.S. 504, 509 (1972).

In Ohio, an incompetent *inter alia*, loses the power to dispose of his property, *Goss v. Fiolini*, 108 Ohio St.115, 140 N.E. 324 (1923); to enter into contracts, *Charles Melbourne and Sons, Inc. v. Jesset*, 110 Ohio App. 502, 163

N.E. 2d 773 (1960) to prosecute or defend legal actions, *Murphy v. Murphy*, 87 N.E. 2d 102 (1948). Not only does an adjudication of incompetence directly interfere with the exercise of legal rights freely afforded competent adults, it often results in social stigmatization.

An individual, however, does not lose all freedoms of choice when involuntarily committed to a state hospital in Ohio. Section 5122.29 of the Ohio Revised Code affords a patient a variety of rights and safeguards in addition to ones recognized by various judicial determinations.

Several courts have found that the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects an individual involuntarily committed to refuse medication, including psychotropic medication. *Rennie v. Klein*, 653 F. 2d 836 (3rd Cir. 1981) and *Davis v. Hubbard*, 506 F. Supp. 915 (N.D. Ohio, 1980).

In *Rennie v. Klein*, the U.S. District Court recognized a *qualified* constitutional right to privacy to refuse psychotropic medication in non-emergency situations.

As noted above, the right to refuse is a qualified right and must be balanced against the individual interests of the state in each case.

In the instant case, Petitioner had a legitimate expectation and entitlement to privacy against forced medication since he clearly did not represent a substantial risk of harm to himself or others and therefore could not be medicated against his will. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

In Ohio, Courts have only recognized a legitimate state interest to force medication on an individual where the individual is *presently violent or self destructive*. *Davis v. Hubbard*, 506 F. Supp. 915, 938 (1980) (emphasis added). These restrictive guidelines were in application at COPH when Petitioner was hospitalized. The testimony of Petitioner's treating physicians indicated that because Petition-

er was not dangerous to himself or others, the hospital policy would not allow forced medication of the patient.

Thus, it is clear that the guardianship application was used as a "tool" to override Petitioner's legitimate expectation and insistence that he would not be medicated against his will. In fact, the application for appointment of a guardian over Petitioner specifically stated the purpose was to give treatment. The application for appointment of a guardian over Petitioner appears in the Appendix hereto.

Petitioner maintains that Ohio's guardianship statute, as applied, is unconstitutionally vague since it fails to give fair warning of the conduct prescribed by law and lacks standards restricting the discretion of courts in applying the law. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) and *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

The Ohio Revised Code in Chapter 2111 at 2111.01(D) defines the term incompetent as:

(D) "Incompetent" means any person who by reason of advanced age, improvidence, or mental or physical disability or infirmity, chronic alcoholism, mental retardation, or mental illness, is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide, or any person confined to a penal institution within this state.

The use of standards in the Ohio guardianship statute such as "improvidence", "mental infirmity" and "mental illness" to define actionable incompetence do not fairly warn an alleged incompetent nor properly restrict the discretion of Ohio Probate Courts.

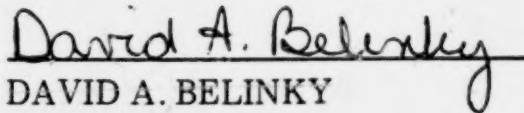
The inclusion of the phrase "incapable of taking proper care of himself or his property" in Section 2111.01 (D) of

the Ohio Revised Code does nothing to clarify the vagueness inherent in this definition of incompetency. Instead of a precise objective standard it merely adds another layer of subjective guesswork to the decision making process. In *Roe v. Conn*, 417 F. Supp. 769 (W.D. Alabama 1976) a three-judge court held unconstitutional a similar statute couched in terms that have no common meaning. Because these terms are too subjective to denote a sufficient warning to those individuals who might be affected by their prescriptions, the statute is unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

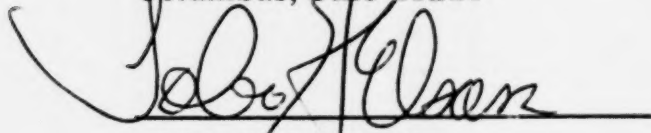
In the case at law, Petitioner had a right to refuse medication and his judgment should not have been substituted by his guardian under Ohio law. Thus, it is clear that the purpose for the guardianship was to circumvent Petitioner's constitutional right to privacy and to refuse medication.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court below.



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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition for Writ of Certiorari was served upon Leslie B. Swinford, 772 S. Front Street, Columbus, Ohio 43206, by regular U.S. mail, postage prepaid, this 20th day of May, 1983.

David A. Belinky
DAVID A. BELINKY

A-1

NO. 82-1838

**THE SUPREME COURT OF OHIO
APPEAL FROM THE COURT OF APPEALS
FOR FRANKLIN COUNTY**

**THE STATE OF OHIO,
City of Columbus.**

In re Guardianship of
Thomas G. Krebs,
Appellant,

vs

Mary Rita Krebs,
Appellee.

1983 TERM

To wit: February 23, 1983

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

In the Matter of
the Guardianship

of Thomas G. Krebs,

Appellant,

No. 82AP-713

: (REGULAR CALENDAR)

(Mary Rita Krebs,

:

No. 82AP-759

Appellee). (ACCELERATED CALENDAR)

MEMORANDUM DECISION

Rendered on October 28, 1982

MERULLO, REISTER & SWINFORD CO., L.P.A., and
MR. LESLIE B. SWINFORD, JR., for appellant.

OHIO LEGAL RIGHTS SERVICE, and MESSRS.
CLEMENT W. PYLES and G. MICHAEL KIRKMAN, for
appellee.

APPEAL from the Franklin County Common Pleas Court,
Probate Division

MOYER, J.

Appellant's accelerated appeal in case No. 82AP-759
having been consolidated with his appeal in case No. 82AP-
713 and having been expedited by this court, the case for
purposes of decision is considered as an accelerated appeal.

The first and second assignments of error are overruled
for the reason that there is clear and convincing evidence
supporting the trial court's conclusion that appellant is

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incompetent as defined by R.C. 2111.01 and that it is therefore necessary that a guardian be appointed for him pursuant to R.C. 2111.02, and because the imposition of a guardianship for appellant does not infringe any constitutional right to refuse medication.

The third assignment of error is overruled because the guardianship statutes of Ohio are not unconstitutionally overbroad and vague.

The fourth assignment of error is overruled because neither the statutory nor case law of Ohio prohibits a guardian from consenting to the medication of the guardian's ward against the will of the ward.

For the foregoing reasons, the judgment of the trial court is affirmed.

Judgment affirmed.

REILLY and COOK, J.J., concur.

COOK, J., of the Eleventh District Court of Appeals, sitting by assignment in the Tenth District Court of Appeals.

**IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT**

In the Matter of :
the Guardianship of : No. 82AP-713
Thomas G. Krebs. : (REGULAR CALENDAR)
and
No. 82AP-759
(ACCELERATED CALENDAR)

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the memorandum decision of this court rendered herein on October 28, 1982, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas, Probate Division, are affirmed.

REILLY, MOYER & COOK, JJ.

By /s/ Thomas J. Moyer
Judge Thomas J. Moyer

COOK, J., of the Eleventh District
Court of Appeals, sitting by assign-
ment in the Tenth District Court
of Appeals.

c.c.: Leslie B. Swinford
G. Michael Kirkman

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Doct 118.

PROBATE COURT OF FRANKLIN COUNTY, OHIO

GUARDIANSHIP OF Thomas G. Krebs Case No. 345,414

INCOMPETENT

APPLICATION FOR APPOINTMENT OF A GUARDIAN

Applicant a resident of Franklin County Ohio asks to be appointed Guardian of the ☒ person and ☐ estate of the above named individual

The proposed ward is

Thomas G. Krebs DOB 11-7-1953
28 E-52 6963 1400 W. Broad St. (Rt. 24)

The facts upon which the application is based are that the proposed ward is mentally or physically incompetent for the following reasons: paranoid, unable to work, can't

manage affairs, application for purpose of
giving treatment

and is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide or is confined to a penal institution within this state.

The next of kin of the proposed ward are (Attach a separate sheet if needed)

W. Herbert E. Krebs father 64 5001 Richmond Ave
W. Mary Rita Krebs mother 62 5001 Richmond Ave
Beren Burman (Sister) 40 2600 Glen Creek Rd. Little Valley Pa
Frank Krebs (brother) 31 2050 Garnet St. Capital, Ca. 93810
Connie Krebs (sister) 31 319 N. Idamille St. R. Gahanna OH 43230
Cecilia Vincent (sister) 26 749 Valerie Ln. Colo OH 43213

The estimated value of the estate of the proposed ward is

Personal Property	\$	8
Annual Rents from Real Estate	\$	0
Real Estate	\$	0
TOTAL	\$	0

PROBATE JUDGE
RICHARD E. MITCHELL
TOTAL
1962 JUN 29 PM 2:29

PROBATE COURT
FRANKLIN CO. OHIO

FILED

§ 2111.01 Definitions.

As used in Chapters 2101. to 2131., of the Revised Code:

(A) "Guardian," other than a guardian under sections 5905.01 to 5905.19, of the Revised Code, means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor, or the division of mental retardation and developmental disabilities, or an agency under contract with the division for the provision of protective services under sections 5119.85 to 5119.89 of the Revised Code, appointed by the probate court to have the care and management of the person of an incompetent.

(B) "Ward" means any person for whom a guardian as defined in this section is acting.

(C) "Resident guardian" means a guardian appointed by a probate court to have the care and management of property in Ohio belonging to a nonresident ward.

(D) "Incompetent" means any person who by reason of advanced age, improvidence, or mental or physical disability or infirmity, chronic alcoholism, mental retardation, or mental illness, is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide, or any person confined to a penal institution within this state.

§ 5122.29 [Rights of patients.]

The department of mental health shall provide and safeguard the following rights for all patients:

(A) The right to a written list of all rights enumerated in this chapter, to that person, his legal guardian, and his counsel. If the person is unable to read, the list shall be read and explained to him.

(B) The right at all times to be treated with consideration and respect for his privacy and dignity, including without limitation, the following:

(1) At the time a person is taken into custody for diagnosis, detention, or treatment under Chapter 5122. of the Revised Code, the person taking him into custody shall take reasonable precautions to preserve and safeguard the personal property in the possession of or on the premises occupied by that person;

(2) A person who is committed, voluntarily or involuntarily, shall be given reasonable protection from assault or battery by any other person.

(C) The right to communicate freely with and be visited at reasonable times by his private counsel or personnel of the legal rights service and, unless prior court restriction has been obtained, to communicate freely with and be visited at reasonable times by his personal physician or psychologist.

(D) The right to communicate freely with others, unless specifically restricted in the patient's treatment plan for clear treatment reasons, including without limitation the following:

(1) To receive visitors at reasonable times;

(2) To have reasonable access to telephones to make and receive confidential calls, including a reasonable number of free calls if unable to pay for them and assistance in calling if requested and needed.

(E) The right to have ready access to letter writing

materials, including a reasonable number of stamps without cost if unable to pay for them, and to mail and receive unopened correspondence and assistance in writing if requested and needed.

(F) The right to the following personal privileges consistent with health and safety:

(1) To wear his own clothes and maintain his own personal effects;

(2) To be provided an adequate allowance for or allotment of neat, clean, and seasonable clothing if unable to provide his own;

(3) To maintain his personal appearance according to his own personal taste, including head and body hair;

(4) To keep and use personal possessions, including toilet articles;

(5) To have access to individual storage space for his private use;

(6) To keep and spend a reasonable sum of his own money for expenses and small purchases;

(7) To receive and possess reading materials without censorship, except when the materials create a clear and present danger to the safety of persons in the institutions.

(G) The right to reasonable privacy, including both periods of privacy and places of privacy.

(H) The right to free exercise of religious worship within the institution, including a right to services and sacred texts that are within the reasonable capacity of the institution to supply, provided that no patient shall be coerced into engaging in any religious activities.

(I) The right to social interaction with members of either sex, subject to adequate supervision, unless such social interaction is specifically withheld under a patient's written treatment plan.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as

an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

Ohio Constitution Comparison

Due process, Ohio Const. art. I § 16.

Equal protection, Ohio Const. art I § 2.